

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 97-128
)	
Martin W. Hoffman,)	
Trustee-in-Bankruptcy for Astroline)	FCC File No. BRCT-881201LG
Communications Company Limited)	
Partnership)	
)	
For Renewal of License of Station)	
WHCT-TV, Hartford, Connecticut)	
)	
Shurberg Broadcasting of Hartford)	FCC File No. BPCT-831202KF
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	
TO: The Honorable John M. Frysiak		
Administrative Law Judge		

OPPOSITION TO REQUEST FOR OFFICIAL NOTICE

Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership ("Hoffman" or the "Trustee"), Richard P. Ramirez ("Ramirez") and Two If By Sea Broadcasting Corporation ("TIBS") (hereinafter the "Respondents" when referred to jointly), hereby oppose the "Request for Official Notice," filed on January 19, 1999 by Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("Shurberg"). For the reasons set forth herein, Shurberg's pleading should be denied. Although styled as a "Request for Official Notice," Shurberg's pleading is an untimely attempt to reopen the record of this proceeding to insert an

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exhibit. Not only is the pleading untimely but the proposed exhibit is not relevant, probative or material.

1. The matter that Shurberg now seeks to inject into this proceeding is an interlocutory ruling by Chief Bankruptcy Judge Krechevsky on October 14, 1998 in the Connecticut bankruptcy court proceeding on Astroline Company, Inc.'s Motion to Dismiss a Complaint filed by the Trustee which seeks to subordinate a claim held by Astroline Company, Inc. to the claims of all other creditors.

2. The record in this proceeding was closed on September 29, 1998. Although styled as a "Request for Official Notice," the request is actually an attempt to reopen the record of this proceeding. Commission case precedent consistently holds that a petition to reopen the record must be supported by newly discovered evidence; that the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing; and that the new evidence would, if true, affect the decision. See LaFiesta Broadcasting Co. et al., 2 F.C.C.2d 255, 256, 6 R.R.2d 884 (1965) and cases cited therein. Moreover, the Commission has stressed that "it is imperative in the orderly execution of the administrative process that a point of finality be reached in administrative proceedings, and only under unusual and compelling circumstances will reopening of a record be permitted." The News-Sun Broadcasting Co., 27 F.C.C.2d 61, 62, 20 R.R.2d 1084 (1971). A Presiding Judge has full discretion to refuse to reopen the record after the hearing has closed. See HS Communications, Inc., 7 FCC Rcd 6448, 6453, para. 16, 71 R.R.2d 961 (1992).

3. Judge Krechevsky's ruling does not affect the record in this proceeding. This proceeding has now been underway for over fifteen years and the necessity for reaching finality is

most compelling. The public in Hartford, Connecticut is disserved by a prolonged continuation of this case since this litigation has deprived the station for many years now of resources it would otherwise have had for programming to serve the Hartford community.

4. Even if Shurberg were able to establish good cause for reopening the record, which he has not, the exhibit he has tendered is not appropriate for judicial notice and is not relevant, material or probative. Judge Krechevsky's ruling is an interlocutory ruling in a proceeding dealing with whether Astroline Company, Inc.'s claim as a creditor should be subordinated. Whether or not Astroline Company, Inc.'s claim is subordinated has no bearing on the issue designated by the Commission in this proceeding. Cf. Lowrey Communications, L.P., 8 FCC Rcd 6721, 6723, n.10, 74 R.R.2d 117 (1993). Moreover, "Rule 201(b) of the Federal Rules of Evidence provides that a judicially noticed fact must be one that is not subject to reasonable dispute in that it is either generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Q Prime, Inc., 9 FCC Rcd 1, n.33 (1993). The ruling Shurberg would introduce does not fall into this category since, apart from its interlocutory nature, the conclusions that Shurberg draws and the relationships he infers are the subject to dispute.

5. Shurberg argues that Judge Krechevsky's October 1998 ruling on the Motion to Dismiss Complaint confirms that "the 1995 Bankruptcy Decision has nowhere near the preclusive effect which Hoffman now claims in the instant proceeding." This argument is simply wrong. Judge Krechevsky makes it very clear that the prior holding "constituted a final judgment on the merits" and "was rendered by a court of competent jurisdiction" but "the Trustee's plea for equitable subordination does not involve the same transaction, evidence or factual issues..."

6. Finally, Shurberg advances an argument he untimely raised in his Reply Findings to the effect that the equitable doctrine of judicial estoppel should be invoked to bar Hoffman from advancing inconsistent positions before the Bankruptcy Court and the Commission. However, the doctrine is not applicable to this case. Under the doctrine of judicial estoppel, “a party may be judicially estopped from asserting a legal position which is inconsistent with both a successfully and an unequivocally asserted position in a prior proceeding... Short of prevailing in the prior litigation, the position of the party sought to be estopped need only have been accorded judicial acceptance.” Erie Telecommunications, Inc., 659 F.Supp. 580, 62 R.R.2d 1467, 1475 (1987), aff’d, 853 F.2d 1084, 65 R.R.2d 1 (3rd Cir. 1988). Notwithstanding the fact that the Trustee does not believe he has advanced inconsistent arguments, the Trustee’s arguments in the Bankruptcy Court were not successful nor were they accorded judicial acceptance. In addition, the record reflects that the Trustee raised the arguments he advanced at the insistence of ACCLP’s creditors, including Shurberg and in discharge of his fiduciary responsibilities to those creditors. In any event, the very case support cited by Shurberg destroys his argument. In Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3rd Cir. 1996), the Court stated:

Asserting inconsistent positions does not trigger the application of judicial estoppel unless “intentional self-contradiction is... used as a means of obtaining unfair advantage.” Scarano, 203 F.2d at 513. Thus, the doctrine of judicial estoppel does not apply “when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court.” Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980). An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing. *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993); *see also Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir.

1987) (holding that the doctrine only applies to deliberate inconsistencies that are tantamount to a knowing misrepresentation to or even fraud on the court.”).

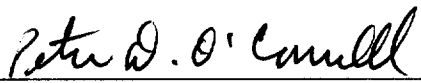
There is absolutely no evidence whatsoever that the Trustee was attempting to mislead the Bankruptcy Court when in his fiduciary capacity he raised arguments concerning ACCLP. To the contrary, the Trustee would potentially have been charged with dereliction of his duties if he had not pursued all avenues of recovering assets for the bankrupt estate -- particularly when creditors had urged him to make the claims against ACCLP. Indeed, Shurberg did not even cross-examine the Trustee about his arguments to the Bankruptcy Court.

In sum there is no merit whatsoever to the Request for Official Notice. It is nothing more than a belated attempt to reopen the record and Shurberg has failed to establish the requisite good cause. Judge Krechevsky's interlocutory ruling in a suit involving whether a creditor's claim should be subordinated in a bankruptcy proceeding is unrelated to the earlier Bankruptcy Court Decision which was affirmed by the Second Circuit Court of Appeals and to the issue designated by the Commission. Shurberg's Request should be denied.

Respectfully submitted,

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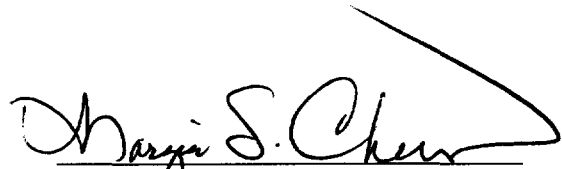
CERTIFICATE OF SERVICE

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **"OPPOSITION TO REQUEST FOR OFFICIAL NOTICE"** was served this 28th day of January 1999, by first-class, postage prepaid mail to the following:

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